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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 886

STERLING DRUG INC., *Petitioner*,

v.

FARBENFABRIKEN BAYER A.G., *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 251 F. 2d 300 and is also printed as Appendix A to the Petition.[1]

The opinion of the District Court is reported at 148 F. Supp. 733 and is printed as Appendix B to the Petition.

QUESTION PRESENTED

Is a national of the Federal Republic of Germany today entitled to access to the United States courts in a private action to recover property wrongfully appro-

[1] In accordance with the footnote appearing on page 3 of the Petition, Bayer's Appendices in the Court of Appeals are numbered and cited 1a, 2a, 3a, etc. The pages of Sterling's Appendix therein are numbered and cited 1b, 2b, 3b, etc.

priated from it, where the property although subject to seizure during the war, was not seized by the Alien Property Custodian?

RESOLUTION, PROCLAMATION AND TREATIES INVOLVED

This case involves congressional Joint Resolution 289, October 19, 1951, 65 Stat. 451, 50 U.S.C. App. Notes preceding Section 1 (1952 ed.). Its text is as follows:

> "* * * That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: *Provided, however,* That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest."

Presidential Proclamation No. 2950, issued pursuant to the Joint Resolution on October 24, 1951, 16 F.R. 10915, 1951 U. S. Code Congressional and Administrative Service p. LXVI, is set forth as Appendix I to this brief.

This case also involves the Agreement Concerning the Treaty Between the United States of America and Germany on Friendship, Commerce and Consular Rights of December 8, 1923, as amended, 5 U.S.T. 1969 (effective 1954), and the Treaty of Friendship, Commerce, and Navigation between the United States and Germany, 7 U.S.T. 1839 (effective 1956).

The pertinent portions of the 1956 Treaty appear as Appendix II to this brief.

STATEMENT OF THE CASE

1. Preliminary

The matters set out in the petition for certiorari under the heading "Statement of the Case", from pages 3 to 12, are for the most part completely immaterial to the issues before this Court. They give the misleading impression that Bayer seeks to enforce performance of contracts which are illegal under the antitrust laws. This is not the position which the respondent will take in the suit. On the contrary, respondent has filed a companion suit against Sterling which charges in effect that Sterling is now using the power, illegally acquired prior to the war, to continue the exclusion of Bayer from the American market. Because respondent does not like to see its position misstated on a public record we have set out, as Appendix III to this brief, our own view of the background of the case and the issues raised in the complaint. It is not included in our brief because we think it irrelevant. This Court cannot appraise a conflict between the petitioner's and the respondent's statements concerning either the background or the merits of the case merely on the basis of the complaint.

The sole ruling of the district court was that respondent because of its so-called enemy status, was disqualified from appearing before an American court. The lower courts here could not and did not pass on any substantive issue.

2. The Relevant Facts

The only facts which are relevant in this Court are the following:

1. Respondent, Farbenfabriken Bayer A.G.,[2] a corporation organized under the laws of the Federal Republic of Germany and engaged in the manufacture and distribution of drugs and pharmaceuticals, filed suit against Sterling Drug, Inc., a Delaware corporation, for an accounting and other relief arising out of the operation of a joint business venture operated by the parties between World War I and World War II in Latin America (App. 3a, 6a-8a, 11a, 12a, 14a; Complaint, ¶¶ 1, 13-20, 41, 42).

2. The claim on which respondent sued was one which arose at least in part prior to World War II. It was thus subject to vesting by the Alien Property Custodian prior to the termination of the vesting program, but the Alien Property Custodian never saw fit to vest or seize it. In these circumstances, prior to a decision on the merits, this Court must assume that Bayer has a valid claim against Sterling, and that Sterling is in wrongful possession of property belonging to Bayer.

---

[2] Farbenfabriken Bayer A.G. is referred to herein as "Bayer" or "Respondent". Sterling and the court below have referred to Bayer as "Farben", a designation which is confusing since it is a name commonly used to apply to I. G. Farbenindustrie A.G. in Liquidation, a predecessor of not only the present company but several of its competitors.

This record, therefore, raises the simple issue of whether Sterling may keep Beyer's property which it unlawfully acquired because Bayer has no access to American courts and cannot maintain a suit.

3. The District Court Opinion

On Sterling's motion, the District Court for the District of New Jersey dismissed the suit on the ground that with respect to the claims alleged Bayer had the "status of an enemy" and was barred from access to the United States courts while that "status" continued (App. B-4). The court was of the opinion that the right to vest or seize German property reserved in the proviso to the Joint Resolution of October 19, 1951 terminating the state of war with Germany, carried with it a disability of Germans to sue in the United States courts to protect such property while it remained subject to an unexercised power of seizure. It held that the choses of action involved herein were still subject to vesting or seizure by the United States and therefore could not be the subject of suit by Bayer against Sterling.

The dismissal ordered by the District Court was stated to be without prejudice to reinstitution of the action "if and when the disqualification incident to the enemy status of the [respondent] is lifted, either by treaty or otherwise, * * *." (App. B-6)

The disqualification found by the court was believed by it not to be a personal disqualification of Bayer. It was based solely on the nature of the claim on which it sued, which the court considered to be still subject to an unexercised power of seizure. In a separate opinion issued the same day in another case in which Bayer sued Sterling under the antitrust laws for an injunc-

tion and damages for Sterling's exclusion of Bayer from the American market in pharmaceuticals, the District Court sustained Bayer's right to access to the court. It distinguished the present case on the ground that the claims involved in the antitrust suit were postwar claims and were therefore not subject to seizure. *Farbenfabriken Bayer A.G. v. Sterling Drug, Inc.*, 148 F. Supp. 738, 739 (1957).

4. Opinion of the Court of Appeals for the Third Circuit

On appeal, the Court of Appeals for the Third Circuit reversed in a unanimous opinion and reinstated the complaint. It held that the Joint Resolution and the ensuing Presidential Proclamation terminating the state of war between Germany and the United States restored Bayer's right to have access to the courts of the United States even while its property for a time remained subject to an unexercised power of vesting or seizure. In the light of this ruling the court found it unnecessary to consider other contentions to the effect that Bayer's property rights were no longer subject to vesting or seizure in consequence of the series of events subsequent to the Joint Resolution of October 19, 1951.[3]

The court held that respondent's right to maintain a suit in the courts of this country was suspended during the Second World War under the "'common law rule,' that the King's subjects had a duty to plunder the King's enemies, subsequently modified to a prohibition, personal to an enemy that *qua* enemy he could not maintain a suit . . ." (App. A-4). The court concluded that, upon the termination of the war by the

[3] These arguments are detailed below under Reason for Denying the Writ at pp. 11-16.

Joint Resolution and the succeeding Proclamation, respondent again became entitled to maintain its suit. The court fully discussed the proviso to the Joint Resolution relied on by petitioner. It stated the reason for the proviso was

> "* * * that it was necessary to retain control of German property already vested and possibly to vest other German property, even though the war had terminated.
>
> "Congress intended to terminate the state of war so as to remove the disqualifications of German nationals as enemies but deemed it necessary to make certain that the President should retain the right to vest certain German property." (App. A-6)

The Court of Appeals therefore held that respondent herein, Farbenfabriken Bayer, a corporation organised under the laws of the Federal Republic of Germany

> "is entitled to maintain its suit and, if the nature of its causes of action and the evidence permit, to secure judgment in the court below." (App. A-8)

The decision is thus interlocutory. As the court below recognised, Bayer ultimately "may not secure a judgment against Sterling." (App. A-8). Sterling is merely required to defend on the merits in the District Court the charge that it improperly misappropriated its partner's assets entrusted to it.

REASONS FOR DENYING THE WRIT

Sterling's petition for a writ of certiorari should be denied for the following reasons:

1. The question presented has no public importance. It does not affect any substantive rights of the Government to retain property vested by the Alien Property Custodian. All the decision does is to permit a German national to bring a private suit to recover property which has never been vested and cannot now be vested, which property has been wrongfully appropriated by an American corporation.

2. There is no conflict with any other Circuit.

3. The decision of the court below is plainly correct and no issues justifying review by this Court are presented by it.

A. The Question Presented Has No Public Importance

Sterling's sole ground for claiming the public importance of the issue here is stated on page 12 of the Petition as follows:

> "If the decision below is allowed to stand, it will nullify the effectiveness of the extensive program of vesting and seizure of enemy assets carried on by the United States Alien Property Custodian under the provisions of the Trading With the Enemy Act."

Petitioner contends that "(b)y this decision, the Court of Appeals for the Third Circuit has opened American courts and indeed invited the filing therein of law suits against the Attorney General for the re-

turn of every piece of vested property (or the equivalent)". (Pet. p. 13)

There is no basis for this contention as the opinion below clearly shows. The Court of Appeals specifically stated that the Joint Resolution terminating the state of war with Germany was designed to permit the Executive "to retain control of German property already vested and possibly to vest other German property." (App. A-6) Nevertheless, Sterling argues that this decision, which interpreted the Joint Resolution as preserving the Government's power to "retain control of" vested German property, must be interpreted as requiring exactly the contrary, i.e., the return of vested German assets to German nationals.

So far as free access to the courts is concerned a German national has every right that an American has to bring a suit against a private individual as in the case here. So far as suits against the Government are concerned he may of course bring them only if the Government has consented to be sued. He cannot bring suit against the Attorney General for return of property because, under Section 9(a) of the Trading With the Enemy Act, 50 U.S.C. App. § 9(a), as construed by the courts, the Government has not consented to be sued by German corporations for the return of property seized. Such consent is given by statute only to persons not wartime enemies (which term includes by definition companies incorporated in Germany, 50 U.S.C App. § 2). *Swiss National Insurance Co.* v. *Miller*, 267 U.S. 42, 44 (1925). In addition there is a coterminous specific statutory ban against return of vested property to German nationals, 50

U.S.C. App. § 39, discussed in *Guessefeldt* v. *McGrath*, 342 U.S. 308 (1952).[4]

The distinction between general access to the courts in suits against private parties and special consent to sue the Government was clearly recognized by the court below. It interpreted the 1951 Joint Resolution as allowing the present private suit while at the same time expressly preserving to the Executive the right "to retain control of German property already vested and possibly to vest other German property". (App. A-6)

B. There Is No Conflict With Any Other Circuit

It is only by first making the untenable argument to the effect that the Court of Appeals decision permits the return of vested property to German nationals that Sterling can assert the existence of a conflict with the decisions of other federal courts. As evidence of this supposed conflict, Sterling cites (Pet., p. 22) a number of decisions in which German nationals or others were held not entitled to have vested property returned to them under the Trading With the Enemy Act. But these cases are not based on any general exclusion of German nationals from access to the courts. They are based on the clear ground that the

---

[4] The Section beings as follows:

"(a) No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this [Trading With the Enemy] Act, shall be returned to the former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. * * *"

Government has not consented to be sued for the return of vested property in such cases.[5]

As pointed out above, the decision of the court below would not permit Bayer, or any other German corporation to secure the return of vested property from the United States by suit under the Trading With the Enemy Act. The Government has not consented to be sued by wartime enemies. *Swiss National Insurance Co.* v. *Miller, supra.* The court below expressly stated that the Joint Resolution terminating the state of war which restored Bayer's right of access to the courts also continued the Government's right "to retain control of German property already vested".

The Joint Resolution merely removed respondent's common law disbarment from all access to the courts which existed during the state of war. It allowed suit against private parties without in any way broadening the scope of the statutory limitations on the right to sue the sovereign for return of vested property. The ruling below thus does not conflict with the ruling of the other federal courts cited in the Petition.[6]

C. The Decision Below Is Plainly Correct and No Issue Justifying Review by This Court Is Presented by It

We cannot add to the clear and convincing reasons given by the Court of Appeals in support of its conclusion that the joint resolution was not intended to

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[5] E.g., *Central National Bank* v. *Brownell*, 137 F. Supp. 686 (N.D. Ohio, 1956), cited by petitioner, states: "Since this is a suit against the United States it can be maintained only after the Government has consented to be sued."

[6] Petitioners is driven to try to make something of a one paragraph lower New York state court opinion which is quoted *in toto* at page 23 of the Petition.

permit a wrongdoer to appropriate and confiscate invested property of Germans after the vesting program had ended.

However, if the opinion of the Court of Appeals remanding the case for trial be questioned, additional grounds urged by respondent, but not reached by the court below, again become relevant.

These points urged by respondent below establish that even if the continued right to vest property on the part of the Government after October 19, 1951 prohibited litigation by German nationals, that right of seizure has long since been terminated. The Joint Resolution preserved the right to vest German property only as incident to the termination of the vesting program. This program came to an end with a Presidential announcement of April 17, 1953 embodied shortly thereafter in a licensing order. Legislative sanctions for vesting were removed by the terms of the interim Treaty of Friendship, Commerce and Consular Rights between the United States and Germany effective 1954, 5 U.S.T. 1939, and the full Treaty of Friendship, Commerce and Navigation between the United States and Germany which became effective in 1956 and superseded the earlier treaty. 7 U.S.T. 1839. These Treaties guarantee German nationals protection against seizure of their property without just compensation. The issues are briefly discussed here.

1. On April 17, 1953, on the occasion of German Chancellor Adenauer's visit to the United States, the White House announced the termination of the program for vesting German-owned property located in the United States. 28 State Department Bulletin 720, 721 (May 18, 1953). In the same announcement the Attorney General stated that no orders would be

issued vesting additional German properties. The Secretary of State declared that the measure was a step to the closer development of normal international relations between the United States and Germany.

2. Once the President had determined not to vest any additional German properties, there was no further reason for blocking transactions in these properties, since the purpose of blocking transactions was primarily to aid the vesting program. Annual Report, Office of Alien Property Custodian, Department of Justice, p. 1 (1953). Accordingly, within a few months, on June 24, 1953, License 101, 18 F.R. 3687, 8 C.F.R. § 511.101a (1958 Rev.), was issued. This general license released all German property from blocking except property which had been seized and property which was held in Iron Curtain countries.

The pertinent portion of General License 101 provides:

> "* * * *a general license is hereby granted licensing all property now blocked under the order to be regarded as property in which no blocked country or national thereof has, or has had, any interest.*" 18 F.R. 3687, 8 C.F.R. § 511.101a (1958 Rev.).

The license thus declared that German property located in this country prior to January 1, 1947, should henceforth be regarded as property in which no blocked national "has, or has had, any interest". It made such property fully as free as any other property. Accordingly, General License 101 removed the application of General Ruling 11-A, 12 F.R. 1458 (March 4, 1947), 8 C.F.R. § 511.211a (1958 Rev.), which had forbidden German nationals to "deal in" or "exercise any rights, powers or privileges" involving property located in

the United States on or before December 31, 1946
License 101 covered the claims involved in this suit
and authorized all transfers or dealing in those claims
Plainly, it also authorized litigation to protect those
claims.

3. A Treaty of Friendship, Commerce and Naviga-
tion between the United States and Germany was
signed on October 29, 1954, and became effective on
July 14, 1956. 7 U.S.T. 1839. This Treaty superse-
ded a 1954 interim Treaty of Friendship between
the two countries, the two treaties being similar in
effect. Both treaties prohibited taking of German
property without just compensation. See 7 U.S.T.
1839, 1844, Art. V, § 4; 5 U.S.T. 1939, 1941, Art.
incorporating by reference, 44 Stat. 2132, 2134 (1923
Art. I, 14.

Sections 1 and 4 of Article V of the 1956 Treat
provide:

> "1. Property of nationals and companies
> either Party shall receive the most constant pro-
> tection and security within the territories of th
> other Party.
>
> • • • • • • • •
>
> "4. *Property of nationals and companies*
> *either Party shall not be taken within the terr*
> *tories of the other Party, except for the publi*
> *benefit and in accordance with due process of la*
> *nor shall it be taken without just compensatio*
> Such compensation shall represent the equivale
> of the property taken and shall be made in a
> effectively realizable form and without unnecessa
> delay. Adequate provision shall have been ma
> at latest by the time of the taking for the dete
> mination and the giving of the compensation
> (Emphasis supplied) 7 U.S.T. at 1844

It is difficult to imagine a clearer and more forceful prohibition against the seizure or vesting of German property than that contained in Article V, § 4 of the Treaty. Under the Trading With the Enemy Act, of course, vested property of German nationals was confiscated. The Government is expressly forbidden to "pay compensation" for such property. 62 Stat. 1246 (1948), 50 U.S.C. App. § 39 (1952 ed.).[1] *Per contra*, under the Treaty just compensation is required and provision for it must be made by the time of the taking, and property may be taken only for public benefit and in accordance with due process of law. Art. V, § 4.

The 1954 Treaty was made prospective in operation so that the ban on confiscation would not affect the right of the United States Government to retain property previously vested under the Trading With the Enemy Act. Art I, 5 U.S.T. 1941. See "Commercial Treaties", Hearings before Subcommittee of the Committee on Foreign Relations United States Senate, 83rd Cong., 1st Sess. p. 19 (1953).

Article VI of the 1956 Treaty (See Appendix II, *infra*) constitutes a solemn undertaking on the part of the United States to accord the citizens of a friendly nation access to the courts of the United States and the utmost protection of their private property. Such an undertaking should of course be implemented by the federal courts. The language of the Treaty is clear and is directly opposed to the position which Sterling would have this Court adopt.

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[1] Text quoted p. 10, n. 4 *supra*.

The Treaties and the Presidential announcement referred to above demonstrate that even if the right to vest respondent's property was for a time a bar to the presentation of its claim (which is not the case), the right to vest has now been terminated and any consequent disability removed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX I

Presidential Proclamation No. 2909, Issued October 24, 1951, 16 F.R. 10813, 1951 U.S. Code Congressional and Administrative Service p. LXVI

"WHEREAS, by a joint resolution, approved by the President on December 11, 1941, the Congress of the United States formally declared a state of war to exist between the United States and the Government of Germany (55 Stat. 796); and

WHEREAS on December 31, 1946, the President proclaimed the cessation of hostilities of World War II; and

WHEREAS it has been and continues to be the policy of the United States to bring about the conclusion of a treaty of peace with the government of a united and free Germany, but efforts to this end have been frustrated and made impossible for the time being by the policy of the Soviet Government; and

WHEREAS it has nevertheless been considered desirable to bring the existing state of war with Germany to a close and to remove Germany from its present enemy status, thus eliminating certain disabilities affecting German nationals; and

WHEREAS the rights, privileges, and status of the United States and the other occupation powers in Germany, and the rights and privileges of the United States and its nationals to which it or they have become entitled as a result of the war, as well as the right to exercise or enforce the same, derive from the conquest of Germany and the assumption of supreme authority by the Allies and are not affected by the termination of the state of war; and

WHEREAS the Congress of the United States by a joint resolution, approved October 19, 1951 (Public Law 181, 82d Congress), has resolved that the state of war declared to exist between the United States and the Government of

Germany is terminated and that such termination shall take effect on the date of enactment of such resolution;

Now, Therefore, I, Harry S. Truman, President of the United States of America, pursuant to such joint resolution, do proclaim that the state of war between the United States and the Government of Germany declared by the joint resolution of Congress approved December 11, 1941 was terminated on October 19, 1951."

APPENDIX II

Treaty of Friendship, Commerce, and Navigation Between the United States and Germany, 7 U.S.T. 1839 (Effective 1956)

"The United States of America and the Federal Republic of Germany desirous of strengthening the bonds of friendship existing between them and of encouraging closer economic and cultural relations between their peoples, and being cognizant of the contributions which may be made toward these ends by arrangements promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments, and establishing mutual rights and privileges, have resolved to conclude a Treaty of Friendship, Commerce, and Navigation, based in general upon the principles of national and of unconditional most-favored-nation treatment reciprocally accorded, and for that purpose have appointed as their Plenipotentiaries:

• • •

Article I

1. Each party shall at all times accord fair and equitable treatment to the nationals and companies of the other party, and to their property, enterprises, and other interests.

• • •

ARTICLE V

1. Property of nationals and companies of either party shall receive the most constant protection and security within the territories of the other party.

• • •

4. Property of nationals and companies of either party shall not be taken within the territories of the other party, except for the public benefit and in accordance with due process of law, nor shall it be taken without just compensation. Such compensation shall represent the equivalent of the property taken and shall be made in an effectively realizable form and without unnecessary delay. Adequate provision shall have been made at latest by the time of the taking for the determination and the giving of the compensation.

• • •

ARTICLE VI

1. Nationals and companies of either party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either party not engaged in activities within the territories of the other party shall enjoy such access therein without any requirement of registration or domestication."

APPENDIX III

Analysis of the Complaint

The petition for certiorari contains recitations of assumed facts contrary to the allegations of the complaint before the court.

Among the many allegations contained in the petition (Pet. 8-11) is a long and misleading history of the negotiations leading to a consent decree against Sterling in

1941. There is also a misinterpretation of some of the documents contained in certain 1923 agreements irrelevant to the present matter but involved in another lawsuit between the parties (Pet. 6-8). These statements are apparently designed to create the impression that Sterling was an innocent victim of a powerful German corporation engaged in "cartel activity" as a result of which it was severely limited in competition abroad. As appears from the companion suit now pending in the New Jersey Federal District Court, the shoe is on the other foot. There Bayer seeks an injunction and damages under the antitrust laws against Sterling for illegally excluding Bayer from the American pharmaceutical market under a conspiracy originating after World War I and continuing to the present time. It is there alleged that it was the German concern that was weak as a result of the economic situation in Germany after World War I and was imposed upon by the trademark piracy of Sterling. It is further alleged that the 1923 agreement limited Bayer and not Sterling. We shall not burden this brief with recounting the many respects in which Sterling departs from the issue, but shall merely recite the allegations of the complaint before the court on this petition.

In its complaint here Bayer alleges that in 1895 its predecessor formed a subsidiary company in the United States and, later other subsidiaries in Latin America, which sold various products of which the best known was Bayer Aspirin (App. 4a, 5a; Complaint, ¶¶ 7-9). During the first World War the United States Alien Property Custodian seized assets of Bayer's predecessor in the United States and sold them to a predecessor of the petitioner (App. 5a; Complaint, ¶ 10). Sterling thereby acquired the Bayer trademark in the United States, and, taking advantage of Bayer's weak and defenseless position as a result of the defeat of Germany in World War I, succeeded in improperly obtaining for itself the registration of Bayer trademarks in some countries of Latin

America (App. 5a, 6a; Complaint, ¶ 12). The strong bargaining position thus obtained by Sterling enabled it to force Bayer to sign a contract for a joint enterprise in Latin America covering the sale of Aspirin and Aspirin products in which Sterling was to receive 25 per cent of the profits of a business which had previously belonged exclusively to Bayer. This agreement was signed in 1920 and was to run for fifty years. The agreement continued to be performed on both sides through the years between the two World Wars (App. 6a-8a; Complaint, ¶¶ 13-18).

After the outbreak of World War II, but prior to the United States' entry into the conflict, Sterling appropriated to itself the entire joint business. It is out of this breach of trust by Sterling in violation of its obligations to its partner that the present causes of action arise (App. 8a; Complaint, ¶¶ 18, 19).

The claims of respondent set forth in the complaint were never vested by the Alien Property Custodian (App. 8a, 10a; Complaint, ¶¶ 20, 27).

The causes of action pleaded may be briefly summarized as follows:

(1) In 1941 the United States and Germany were not at war and Sterling continued to perform under the contract. However, it made no accounting or payment of the profits of the joint enterprise. Also, some payments on account of 1940 were not made (App. 8a; Complaint, ¶ 18).

The funds were not vested by the Alien Property Custodian (App. 8a, 10a; Complaint, ¶¶ 20, 27).

Respondent prays for an accounting of the profits of the joint Latin American business under the 1920 contract for the years 1940 and 1941 (App. 8a).

(2) In 1941 Sterling embarked upon a plan to appropriate to itself the Latin American Aspirin market and to

exclude Bayer. Using the good will, distribution methods and other valuable assets of the joint enterprise Sterling introduced into the Latin American market a substitute Aspirin product, by which it succeeded in taking over 100 per cent of the business of the joint enterprise. Respondent's own funds were used to further this scheme. Sterling also took steps to obtain control of the Bayer trademarks not for use but only to bar respondent from returning to the Latin American market after the war (App. 10a; Complaint, ¶ 26). After the war when commercial relations between United States and German companies were again possible, Sterling refused to grant Bayer any payment in respect of the business created with the funds and good will of the joint enterprise or to make any accounting concerning the joint enterprise. Respondent alleges that Sterling is by reason of its actions trustee of the business in Aspirin and Aspirin products it now conducts in Latin America.

This claim was not vested by the Alien Property Custodian.

Respondent prays the Court to declare Sterling a trustee and to require Sterling to account to respondent with respect to said business (App. 8a-11a; Complaint, ¶¶ 21-30).

The respondent has no desire to resume the old partnership. The present action is in the nature of an accounting on the dissolution of the partnership. In September 1941 Sterling, without notice to respondent, consented to a decree with the Department of Justice under the antitrust laws under which it was enjoined from performing a number of contracts, including the Latin American Aspirin contract of 1920. The present claims for an accounting are justified irrespective of the legality or illegality under the antitrust laws of the old partnership between the parties in Latin America.